

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY GLENN ALEXANDER,

Defendant-Appellant.

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UNPUBLISHED

September 11, 2003

No. 234744

Jackson Circuit Court

LC No. 01-001458-FH

Before: Meter, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant appeals by right his jury conviction of two counts of fraudulent use of a financial transaction device, MCL 750.157q, and false pretenses over \$100, MCL 750.218. We affirm.

Defendant argues that the prosecutor abused his discretion by charging defendant under a theory of aiding and abetting. We disagree.

We review for an abuse of discretion a prosecutor's decision regarding what charges to bring against a defendant. *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998). There is no indication on the record that the information was amended to add an aiding and abetting charge. Nevertheless, if supported by the facts, the prosecutor has broad discretion to determine what charges to bring against a defendant. *People v Yeoman*, 218 Mich App 406, 414; 215 NW2d 145 (1996). The prosecutor asked the trial court for an aiding and abetting instruction before the close of proofs, and defense counsel ultimately acceded to the instruction. A person who assists in the commission of a crime is as guilty as a principal and may be prosecuted regardless whether the principal offender is convicted. *People v Mann*, 395 Mich 472, 477-478; 236 NW2d 509 (1975). Because we conclude *infra* that the evidence supported charging defendant as an aider and abetter, we find that defendant's due process rights under the Fifth and Tenth Amendments to the US Constitution were not violated.

Defendant next argues the aiding and abetting charge constituted prosecutorial overcharge. Although defendant raised this issue in the statement of issues presented, an issue is not properly presented for appellate review if the defendant does not address the issue in his brief. *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992). Because defendant failed to argue the issue in his brief, the issue is abandoned on appeal. *Id.*

Defendant next argues that the court erred by instructing the jury on aiding and abetting because the evidence did not support the instruction. We disagree.

We review de novo claims of instructional error. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). However, unpreserved claims are reviewed only to determine whether manifest injustice has occurred. *People v Kelly*, 423 Mich 261, 277; 378 NW2d 365 (1985). The court has a duty to ensure that the jury has a clear understanding of what it must decide, and must fully inform the jury of the law applicable to the facts. *Mann, supra* at 478. Instructions must not exclude material issues, defenses, or theories where supported by evidence. *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975).

In the instant case, the jury could have found defendant guilty of the fraudulent Sam's Club purchases even if it could not determine that he was the one who made the purchases. In addition, the prosecutor presented evidence connecting defendant to the fraudulent Sears purchase. Thus the jury was correctly instructed, and we find no error. *Mann, supra* at 476.

Defendant next argues he was subjected to double jeopardy when he was convicted of false pretenses and fraudulent use of a financial transaction device. We disagree.

A double jeopardy claim involves a question of law, which is reviewed de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). However, unpreserved issues are reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Whether federal double jeopardy rights have been violated is determined by the test set forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 2d 556 (1932), which holds that double jeopardy is not violated by conviction of two offenses where each offense requires proof of an element that the other does not. MCL 750.218 requires reliance by the victim on a false representation, which is not required to prove MCL 750.157n. And MCL 750.157n requires use of someone else's property without consent, which is not required to prove MCL 750.218. Because each offense requires proof of an element the other does not, defendant's federal double jeopardy rights were not violated.

Defendant failed to properly challenge his conviction on state double jeopardy grounds because his statement of questions presented raised only the federal Constitution. Nevertheless, we will address the state issue briefly here. Whether defendant's state double jeopardy rights were violated is determined by legislative intent rather than the test set forth in *Blockburger, supra* at 304. *People v Denio*, 454 Mich 691, 708; 564 NW2d 13 (1997). Where the Legislature clearly intended to impose multiple punishments for similar crimes, a defendant's double jeopardy rights are not violated because the Double Jeopardy Clause does not apply to legislative acts. *People v Ayers*, 213 Mich App 708, 716; 540 NW2d 791 (1995). Legislative intent is determined by the social norms the statute was designed to protect, the authorized amount of punishment, whether the statutes build on each other, and any other sources of legislative intent. *Id.* at 718-719.

The purpose of MCL 750.218 is to protect the unwary from those who would take advantage of another's negligence or incompetence. *People v Reigle*, 223 Mich App 34, 41; 566 NW2d 21 (1997). On the other hand, MCL 750.157n was designed to prevent theft of property, *People v Ainsworth*, 197 Mich App 321, 326; 495 NW2d 177 (1992), and protect both the issuer

as well as the person to whom the financial transaction device was issued. *People v Collins*, 158 Mich App 508, 511; 405 NW2d 182 (1987). MCL 750.157n was designed to protect more than one type of victim – the retailer, the card issuer, and the person to whom the card was lawfully issued. House Legislative Analysis, HB 4444, 4445, and 4446, August 12, 1998. Not all of these victims are subject to deception by an offender’s false statements. Thus, the Legislature clearly intended to impose multiple punishments, and defendant’s state double jeopardy rights were not violated.

Defendant next claims counsel was ineffective by failing to sever the offenses. We disagree.

Appellate review of an ineffective assistance of counsel claim involves a mixed question of fact and constitutional law. *People v Le Blanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court’s findings of fact for clear error, and constitutional questions de novo. *Id.* at 579. However, because this issue was not preserved, appellate review is limited to “mistakes apparent on the record.” *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish a claim of ineffective assistance of counsel, a defendant must show counsel’s performance fell below an objective standard of reasonableness, and defendant was denied a fair trial as a result. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Offenses are severable by right when the offenses are unrelated. MCR 6.120(B). However, offenses are considered related when they indicate a single scheme or plan. MCR 6.120(B)(2). In the instant case, the offenses involved a series of purchases on credit, using the name and social security number of the victim, and were committed within a three-day time span. Because defendant used the same name and social security number to obtain credit, the offenses were related. *People v Tobey*, 401 Mich 141, 151; 257 NW2d 537 (1977). Because each offense involved a large purchase within a short period of time, they indicated a single scheme or plan, *id.* at 151-152, and defendant did not have a right to mandatory severance.

However, severance is permissible if it promotes a fair determination whether a defendant is guilty or innocent. MCR 6.120(C). Because there was no evidentiary hearing, defense counsel’s reasons for failing to object to severance are unknown, and there is a strong presumption that counsel’s actions constituted sound trial strategy. *People v Marcus Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Matters of trial strategy will not be second-guessed on appeal. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

A defendant can overcome the presumption of effective assistance by showing that but for counsel’s failure to act, the results of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). However, had the offenses been severed, the evidence for each offense would likely have been admissible at trial for the other offenses pursuant to the similar-acts statute, MCL 768.27. Thus, defendant’s chances for acquittal if severance had occurred were not greatly increased. *People v Krist*, 93 Mich App 425, 437; 287 NW2d 251 (1979). Therefore, defendant has not demonstrated sufficient prejudice to support his claim of ineffective assistance of counsel.

Affirmed.

/s/ Patrick M. Meter

/s/ Michael J. Talbot

/s/ Stephen L. Borrello